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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas
Fifteenth Judicial Circuit

Honorable Benjamin H. Culbertson
Circuit Court Judge

Appellate Case No.: 2023-001462

Thomas C. Onions, Jacqueline Onions, Laura Kopchynski, and Lane's Professional Pest Elimination, Inc. ……..……Of Whom Laura Kopchynski is the Petitioner.

v.

Rory M. Isaac and Kimberly J. Isaac …….. Respondents

REPLY TO RETURN TO PETITION FOR CERTIORARI

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INTRODUCTION

Pursuant to **Rule 242(g)** of the South Carolina Appellate Court Rules, Petitioner Laura Kopchynski ("Petitioner" or "Kopchynski") submits this reply to the arguments raised by Respondents Rory M. Isaac and Kimberly J. Isaac (collectively, "Respondents") in their Return to Kopchynski's Petition for Certiorari. Petitioner incorporates all arguments she raised in her Petition for Certiorari as well as those raised before the Court of Appeals.

ARGUMENT

1. Contrary to Respondents' argument, the Court of Appeals improperly applied the "mere scintilla" standard in reviewing Petitioner's Motion for Summary Judgment under Rule 56(c), SCRCP as to negligent misrepresentation and violation of the South Carolina Residential Property Disclosure Act.

Respondents argue that, despite this Court's subsequent decision in *Kitchen Planners, LLC v. Friedman*, the Court of Appeals applied the proper standard for motions under Rule 56(c), SCRCP. In *Kitchen Planners*, this Court clarified that the "mere scintilla" standard does not apply under Rule 56(c); rather, the proper standard courts must apply is the "genuine issue of material fact" standard set forth in Rule 56(c). *Kitchen Planners, LLC v. Friedman*, 2023 S.C. LEXIS 164, 2023 WL 5420401 at *10 (2023). However, a review of the Court of Appeals' Opinion demonstrates that the Court of Appeals applied the impermissibly low "mere scintilla" standard in reversing in part the trial court's grant of Petitioner's Motion for Summary Judgment.

In its Opinion, the Court of Appeals explained that it "need not find the evidence presented so far is determinative; simply that it is either a scintilla or more than a scintilla."[1] R. p. 716 (emphasis added). The Court of Appeals' application of the improper "mere scintilla"

[1] We read the Court of Appeals' Opinion as applying the "mere scintilla" standard to Respondents' negligent misrepresentation and violation of the Residential Property Disclosure Act claims, while applying heightened standards to Respondents' fraud and conspiracy claims.

standard to Petitioner's Motion for Summary Judgment under Rule 56(c) is further demonstrated by the fact that it applied the "more than a mere scintilla" standard when evaluating Respondents' claims for fraud and conspiracy, which carry a higher burden of proof. R. p. 716-717. In doing so, the Court of Appeals held that Respondents *did not* establish their claims beyond a mere scintilla.

In evaluating Respondents' fraud claims, the Court of Appeals correctly explained that it "must find that there is *more* than a mere scintilla supporting the Isaacs' case."[2] R. p. 716 (emphasis in original). Crucially, the Court of Appeals further elaborated, "[w]e struggle to find a 'verifiable spark' that Kopchynski knew the statements she made regarding the June 18 CL-100 were false or that she *recklessly* disregarded their falsity."[3] *Id*. (emphasis in original). It follows from the Court of Appeals' conclusions that if Respondents failed to demonstrate *more* than a mere scintilla of evidence that Petitioner knew her statements were false or that she recklessly disregarded its falsity, then Respondents have only presented a mere scintilla of evidence or less as to that allegation.

The Court of Appeals correctly notes that Respondents' fraud claim requires a heightened burden than their negligent misrepresentation claim. R. p. 716. However, Respondents based all their claims on the *same* underlying facts and failed to demonstrate to the Court of Appeals that more than a mere scintilla of evidence exists as to their allegations regarding Petitioner's

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[2] Regarding Respondents' conspiracy claims, the Court of Appeals correctly noted that there is "no evidence in the record" indicating that there is a genuine issue of material fact as to the required 'combination of two or more persons' between Petitioner or anyone else. R. p. 717.

[3] South Carolina's pre-*Kitchen Planners* jurisprudence required a "verifiable spark to be present in order to conclude a "scintilla" of evidence existed. *See Bethea v. Floyd*, 177 S.C. 521, 529. 181 S.E. 721, 724 (1935) ("'[s]cintilla means, according to 56 C. J. 863, a 'gleam,' 'a glimmer,' '*a spark*,' 'the least particle,' 'the smallest trace'") (emphasis added) *See also Gibson v. Epting*, 426 S.C. 346, 353, 827 S.E.2d 178, 181 quoting *Scintilla*, The Oxford English Dictionary (2nd ed. 2018) ("[a] *spark*…a minute particle, an atom") (emphasis added).

statements. *See* R. p. 715-716 ("[b]ased on the record before us, the Isaacs presented enough evidence for two of their claims to survive summary judgment. [] The Isaacs have presented the following evidence…"). Accordingly, the Court of Appeals found that Respondents failed to present more than a mere scintilla of evidence, and therefore Respondents have failed to demonstrate a genuine issue of material fact under the proper standard contained in Rule 56(c), SCRCP and clarified by *Kitchen Planners, LLC v. Friedman*. *Kitchen Planners, LLC v. Friedman*, 2023 S.C. LEXIS 164, 2023 WL 5420401 (2023).

2. Respondents' Return to Petition for Certiorari misstated or misapprehended several key facts in the record.

a. Petitioner never affirmatively stated the June 18 CL-100 was good, and regardless, there is no genuine issue of material fact that Respondents did not rely on any of Petitioner's representations regarding the June 18 CL-100.

Respondents take Petitioner's words out of context in contending that Petitioner conclusively stated that the June 18, CL-100 "was good." Rather, Petitioner stated, "*from what I understand*, it was good." R. p. 179-180 (emphasis added). In this respect, she (1) stated to the Isaacs' agent what she was told, (2) made clear that she had not reviewed the June 18 CL1-100, and (3) offered to obtain a copy of the June 18 CL-100 for the Isaacs' agent, which was declined. No reasonable jury could read this statement as an affirmation that the CL-100 was "good," nor have Respondents demonstrated that Petitioner did not in fact "understand" the CL-100 to be anything other than "good."[4]

[4] Respondents point this Court to the testimony of Henry Moore to support the contention that Petitioner should have "stopped the closing" on the grounds that "no mortgage lender or buyer would have closed on the property" due to the issues raised in the June 18 CL-100. Return to Petition for Certiorari, p. 15. Mr. Moore holds himself out as a "licensed pest control operator" and "licensed home inspector," and it is unclear what Mr. Moore's qualifications are to opine on what a real estate licensee or mortgage lender should or should not do in a given situation. *See* R. p. 426-427.

Furthermore, Respondents' Return to Petition of Certiorari conveniently leaves out the full statement Petitioner made to Ed Kimbrough, the Respondents' real estate agent ("Kimbrough"): "CL-100 was done yesterday and from what I understand it was good, but I can obtain the report if/when necessary as the sellers paid for it." R. p. 179 (emphasis added). Respondents do not, and cannot, dispute that Petitioner offered to provide a copy of the CL-100 to their agent, and that he declined, as he intended to have his own CL-100 done on Respondents' behalf. *See* R. p. 127, lns. 5-20; *See also Quail Hill, LLC v. Cty. of Richland*, 387 S.C. 223, 240, 692 S.E.2d 499, 508 (2010) quoting *AMA Mgt. Corp. v. Strasburger*, 309 S.C. 213, 420 S.E.2d 868, 874 (Ct. App. 1992) (explaining that there can be no liability for negligent misrepresentation where the plaintiff could have ascertained the matter on his own through the exercise of due diligence").

To reiterate, Kimbrough testified that he did not want to review, nor did he intend to rely on, the June 18 CL-100 on Respondents' behalf. As Kimbrough testified, the June 18 CL-100 "was not even relevant from a date period…We would have to have another one done prior to closing anyways."[5] (R. p. 585, lns. 3-12) (emphasis added). The portion of Kimbrough's deposition cited by Respondents further demonstrates that Respondents, through their agent, did not rely on the alleged misrepresentation. In the record cited by Respondents, Kimbrough

[5] As Kimbrough correctly notes, even if Respondents or Kimbrough *had* asked Petitioner to provide them with a copy of the June 18 CL-100, the CL-100 clearly states that "THIS REPORT [IS] VALID FOR 30 DAYS ONLY. THIS REPORT IS NOT A GUARANTEE OR WARRANTY AGAINST FUTURE INFESTATION OR DAMAGE." R. p. 625-626 (emphasis in original). Accordingly, Respondents would have had to perform another CL-100 prior to their July 23, 2018 closing regardless of whether they asked Petitioner for a copy of the June 18 CL-100 to review. Thus, Respondents could not have been damaged by any mischaracterization of the June 18 CL-100 by Petitioner.

acknowledges that taking "responsibility for the CL-100 ourselves" is what "[they] planned to do all along." R. p. 590, lns. 1-22.

The Isaacs' realtor confirmed that they planned to have their own CL-100 inspection performed, regardless of the contents of the June 18 CL-100. R. p. 590, lns. 1-22; *See also McLaughlin v. Williams*, 379 S.C. 451, 457-58, 665 S.E.2d 667, 672 (Ct. App. 2008) (holding that a home purchaser had no right to rely on a disclosure statement where a subsequent CL-100 was performed on the property). When Kimbrough was subsequently asked if Petitioner gave him the opportunity to see the June 18 CL-100, Kimbrough affirmatively stated, "[s]he did." R. p. 590, lns. 23-25.

Accordingly, there is no genuine issue of material fact that Respondents did not reasonably rely on Petitioner's statement that "from what I understand, it was good" regarding the June 18 CL-100. There is likewise no genuine issue of material fact that Petitioner offered to provide the CL-100 to Respondents, and Respondents, through their agent, declined, and subsequently had their own CL-100 done.

b. There is no genuine issue of material fact that Kopchynski knew or had reasonable cause to believe that the disclosure statement was misleading or that the contractor hired by the Onions failed to fix the alleged issues.

Respondents further argue that Petitioner knew the Onions' disclosure statement was inaccurate, misleading, or incorrect when it was signed, due to her "close personal and professional relationship with the Onions and the neighborhood." Return to Petition for Certiorari, p. 8. To support this contention, Respondents merely allege that *the Onions* (not Petitioner) knew that the disclosure statement was inaccurate through the affidavit of the Onions' former neighbor, Brad Cromartie, which made no mention of the Petitioner at all. R. p. 414-415.

Respondents then attempt to conjure up a genuine issue of material fact by alleging that Andy Ward, a crawl space inspector, informed her of issues with the property. Return to Petition for Certiorari, p. 9.[6] However, in to the disclosure of some elevated moisture levels in the crawlspace, the Onions hired Emery Custer, a *licensed* specialty contractor, to give a second opinion and to perform repairs on the property. R. p. 167, ln. 18-p. 173, ln. 25. After Mr. Custer completed the repairs, Petitioner emailed the Coles' realtor a list of repairs completed by Mr. Custer, which included installation of a fan in the crawlspace to address elevated moisture levels. R. p. 483-484. Respondents allege that this list of repairs was forged by Mr. Onions; however, that is not true. It is undisputed that (1) the repairs listed on the repair verification were in fact performed, (2) that Mr. Onions testified that he drafted the repair verification based upon repairs that were in fact performed, and (3) that Kopchynski did not even have knowledge that Mr. Onions had drafted the verification. Thus, no evidence in the record demonstrates that Petitioner was aware of any "forgery," nor do Respondents dispute that the repairs identified in the repair summary represent an accurate list of the repairs Mr. Custer performed.[7]

To be clear, Petitioner is not a licensed contractor, and she had no reason to believe Mr. Custer improperly performed any of the repairs.[8] Petitioner had no duty to review Mr. Custer's work, nor did she have the expertise to do so. To put such a burden on real estate licensees drastically expands their duties beyond those established by our Legislature and codified at S.C.

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[6] Mr. Ward inspected the property on May 16, 2018, over a month before Petitioner contacted Respondents' agent informing him that the house was available. R. p. 433.

[7] In fact, Respondents themselves argue that Mr. Onions "secretly" forged the first letter. *See* Return to Petition for Certiorari, p. 11.

[8] Respondents argue that "[p]resumably, a [real estate] licensee should be held to a higher standard in observing defects than would be expected of the average home buyer." Return to Petition for Certiorari, p. 22. It is unclear why Petitioner would be in a better position to more readily observe defects in the home when she is not a licensed contractor and does not have the expertise necessary to identify such defects.

Code Ann. § 40-57-350(G)(2), which squarely absolves real estate licensees for information contained in reports or opinions prepared by termite inspectors or home inspectors.

Simply put, the Onions hired a contractor to perform certain repairs to the property. Petitioner disclosed these repairs to Respondents and had no reason to believe that the repairs were not effective. Therefore, there is no genuine issue of material fact that Petitioner did not make any negligent misrepresentations that Respondents reasonably relied on, nor that she violated the Residential Property Disclosure Act.

3. Respondents failed to petition this Court for certiorari to review the Court of Appeals' affirmation of summary judgment as to Respondents' fraud and conspiracy claims, and accordingly, any arguments regarding those causes of action have been abandoned on appeal.

The Court of Appeals affirmed the trial court's grant of summary judgment to Petitioner as to Respondents' claims for fraud and conspiracy. R. p. 708-718. However, Respondents failed to petition this Court for a writ of certiorari within thirty days of the petition for rehearing being finally decided by the Court of Appeals. *See* Rule 242(c), SCACR. Accordingly, the arguments raised in Respondents' Return to Petition for Certiorari regarding their fraud and conspiracy claims have been abandoned on appeal, and accordingly are not properly before this Court.

4. The Court of Appeals properly found that Respondents' procedural arguments were either unpreserved or abandoned on appeal.

Respondents again raise several procedural arguments in their Return to Petition for a Writ of Certiorari that the Court of Appeals properly concluded were either unpreserved or abandoned on appeal. R. p. 718. However, where an argument is conclusory and unsupported by authority, it is deemed abandoned. *Miller v. Dillon*, 432 S.C. 197, 207, 851 S.E.2d 462, 468 (Ct. App. 2020) quoting *State v. Howard*, 384 S.C. 212, 217, 682 S.E.2d 42, 45 (Ct. App. 2009) ("[a]n issue is deemed abandoned and will not be considered on appeal if the argument is raised

in a brief but not supported by authority"); *see also Jones v. S.C. Dep't of Health & Envtl. Control*, 384 S.C. 295, 317, 682 S.E.2d 282, 294 (Ct. App. 2006) (finding an issue abandoned on appeal where the argument is "conclusory and unsupported by authority").

Regarding the timing of the filing of Petitioner's Memorandum in Support of her Motion for Summary Judgment, the Court of Appeals properly concluded that this argument was either unpreserved or abandoned on appeal. R. p. 718. Specifically, the Court of Appeals found that these arguments were unpreserved or abandoned because Respondents cited an order from this Court without interpreting case law, as well as an unrelated argument under Rule 54(b), SCRCP. *Id*.

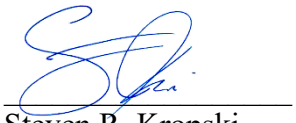
As to Respondents' arguments that discovery is incomplete, the Court of Appeals properly found that this argument was also either not preserved or abandoned on appeal. *Id*. Specifically, the Court of Appeals found that "the Isaacs offer two paragraphs and one citation. Even if this issue is preserved for appeal in the strictest sense, the Isaacs have not offered enough specificity on what they hope to discover." *Id*. Nevertheless, Respondents appear to have copied and pasted the same "two paragraphs and one citation" in their Return to Petition for a Writ of Certiorari. *See* Respondents' Return to Petition for a Writ of Certiorari p. 26. Accordingly, this issue is unpreserved or abandoned on appeal, and this Court should not consider it.

CONCLUSION

Based on the foregoing and the arguments raised in Petitioner's Petition for a Writ of Certiorari, Petitioner Kopchynski requests that this Court accept certiorari and reverse the Court of Appeals' reinstatement of Buyers' claims for negligent misrepresentation and violation of the Residential Property Disclosure Act.

Respectfully submitted,

EARHART OVERSTREET, LLC



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